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Supreme Court of the United States

OCTOBER TERM, 1968

No. 379

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

v.

N. V. NEDERL. AMERIK STOOMV. MAATS.,
Respondent.

MOTION FOR RECALL OF JUDGMENT

EDMUND F. LAMB,
Attorney for Respondent,
N. V. Nederl. Amerik Stoomv. Maats.,
Office and P. O. Address,
80 Broad Street,
New York, New York 10004.

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v.

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

MOTION FOR RECALL OF JUDGMENT

Respondent, N. V. Nederl. Amerik Stoomv. Maats., hereby moves this Court for recall of the certified copy of the judgment of this Court, dated October 21, 1968 in the above entitled cause from the United States District Court for the Southern District of New York and for amendment of the judgment to provide for remand of the case to the United States Court of Appeals for the Second Circuit for the reasons set forth in the Petition hereto annexed.

Dated: New York, N. Y., November , 1968.

EDMUND F. LAMB,
Attorney for Respondent,
N. V. Nederl. Amerik Stoomv. Maats.,
Office and P. O. Address,
80 Broad Street,
New York, New York 10004.

Petition in Support of Motion

The petition of N. V. Nederl. Amerik Stoomv. Maats. in support of the motion hereto annexed respectfully shows:

1. By its decision herein dated October 21, 1968, this Court granted the petition for certiorari of International Terminal Operating Co., Inc., to review a judgment of the United States Court of Appeals for the Second Circuit entered on April 12, 1968, which reversed a judgment of the United States District Court for the Southern District of New York entered on May 3, 1967. The decision of this Court at the same time reversed the judgment of the United States Court of Appeals. The decision of this Court is reported at 21 L. Ed. 2d 58.

2. The decision of this Court, however, did not reinstate the District Court's judgment in favor of the petitioner dismissing respondent's third-party action for indemnity.

3. The judgment of this Court dated October 21, 1968, which was transmitted to the Clerk of the United States District Court for the Southern District of New York on November 15, 1968, and which has been filed and docketed in that Court on November 19, 1968 recites "that this cause be, and the same is hereby, remanded to the United States District Court of the Southern District of New York for further proceedings in conformity with the opinion of this Court."

4. It is respectfully submitted that the certified copy of the judgment of this Court forwarded to the Clerk of the United States District Court for the Southern District of New York on November 15, 1968 should be recalled, and that the judgment should be amended to provide for a remand of the case to the United States Court of Appeals

for the Second Circuit "for further proceedings in conformity with the opinion of this Court", for the following reason:

On respondent's appeal to the United States Court of Appeals for the Second Circuit from the judgment in favor of petitioner dismissing its third-party complaint for indemnity, respondent, as appellant in that Court, raised the issue on appeal that the verdict should be set aside and a new trial granted because of error in the admission of evidence and in the charge to the jury in three respects, as pointed out in respondent's brief in opposition to the petition for certiorari herein at p. 14:

> i. in improperly admitting into evidence Section 9.93 of the Safety and Health Regulations for Longshoring (29 C.F.R. Sec. 9.1 et seq., renumbered as of January 1, 1964, 1504.1 et seq.), which are inapplicable as to shipowners under Secs. 9.2 and 9.3(c), and in charging that the jury could take these regulations into consideration as against the shipowner and in favor of the stevedore.
>
> ii. in admitting into evidence the contract between the shipowner and the stevedore and in charging the jury that they could take into consideration a provision of that contract requiring the stevedore to advise the shipowner immediately of any hazardous conditions which require remedy (189a), as limiting the stevedore's law-implied warranty of workmanlike service.
>
> iii. in improperly charging the jury that if they found the facts to be as testified to by the stevedore's hatch boss, they must bring in a verdict for the defendant-stevedore.

Since the Court of Appeals reversed the judgment as a matter of law, it never came to a consideration of these questions.

5. Since this Court has not by its decision herein reinstated the verdict in favor of petitioner, the remand "for further proceedings", it is submitted, should be directed to the United States Court of Appeals for the Second Circuit so that they may pass upon these undecided questions. 28 U.S.C. § 2106. This, it is submitted, is in conformity with the practice followed by this Court in *Pasquale Palermo, Petitioner* v. *Luckenback Steamship Company*, 355 U. S. 910 (No. 350).

WHEREFORE, it is prayed that respondent's motion to recall the certified copy of the judgment herein sent to the United States District Court for the Southern District of New York be granted, and that the judgment entered herein on October 21, 1968 be amended to provide for a remand of the case to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

N. V. NEDERL. AMERIK STOOMV. MAATS.

By: EDMUND F. LAMB,
Atty. for Respondent.